



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO 111 OF 2013

(FORMERLY NYERI HCCA 188 OF 2011)

(From original Order dated 18/11/2011 in Murang'a CMCC No 400 of 2009 – J Gathuku, RM)

PETER KARIUKI KARUGUCHU.....APPELLANT

VERSUS

STEPHEN WAITHAKA MWANGI.....RESPONDENT

J U D G M E N T

1. The Appellant herein, **Peter Kariuki Karuguchu**, was the defendant before the lower court while the Respondent, **Stephen Waitthaka Mwangi**, was the Plaintiff. The Respondent's claim before the lower court was in negligence on account of a road traffic accident. General damages for pain, suffering and loss of amenities were sought in respect personal injuries suffered. There was also a small claim in special damages.

2. The Respondent obtained judgment in default of appearance and/or defence and subsequently final judgment upon formally proving his case. He was awarded general damages of KShs 350,000/00 and special damages of KShs 3,600/00, plus costs and interests at court rates. The Respondent then proceeded to execution.

3. It was at that stage that the Appellant successfully applied to the lower court for orders to set aside the **ex parte** judgment and for leave to defend the suit. In allowing the Appellant's application however, the court imposed the condition that the Appellant deposits the entire "decretal" amount (KShs 417,656/00) in a joint interest-earning account in the names of the advocates for the parties on record within sixty (60) days from the date of the order (18/11/2011). This appeal is against only that specific order requiring deposit of the decretal sum as a condition of setting aside the **ex parte** judgment and leave to defend the suit.

4. I have considered the submissions of the learned counsels. The Appellants' complaint is that the order appealed against was unfair and unjust, and amounted to a denial of the Appellant's right to defend the suit. On his part the Respondent urges that the order was fair and just in the circumstances, and amounted to a proper exercise of the learned magistrate's discretion.

5. **Order 10, Rule 11** of the *Civil Procedure Rules, 2010* gave the lower court a wide discretion subject only to dictates of justice. That Rule states –

“11. Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

The only issue I have to consider in this appeal therefore is whether the order appealed against was just in the circumstances of the case.

6. Deposit of decretal amounts will normally be required where the decree remains in place until otherwise set aside – usually as a condition for stay of execution of the decree. Where the court has just set aside the decree in question and granted leave to the applicant to defend the suit, why should it, as it were, revive the decree by demanding that the decretal amount be deposited?

7. This was a claim in negligence and it would appear that there was a third party involved in the accident. The outcome of a full trial of the action could not have been certain at all. Why then require one party to go through the hustle of looking for and depositing a decretal sum when there was no decree in place?

8. Of course it would be just for the Appellant to incur some penalty for the indulgence of having the **ex parte** judgment set aside and the liberty to defend the suit. But the proper penalty in the circumstances of this case would have been to require him to pay the Respondent's thrown-away costs thus far incurred. I hold that the requirement for him to deposit the decretal sum (where the decree had just been set

aside!) amounted to an unjust fetter on the leave just granted to the Appellant to defend the suit.

9. I will in the event partially allow the appeal by setting aside the order requiring the Appellant to deposit the decretal sum and substitute therefor an order requiring him to pay the Respondent's thrown-way costs incurred as at the date of the lower court's order. Such thrown-away costs shall be paid within 21 days of agreement or taxation thereof. In default the Respondent may execute the same. It is so ordered. Parties shall pay their own costs of this appeal.

DATED AND SIGNED AT MURANG'A THIS 23RD DAY OF MARCH 2017

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 24TH DAY OF MARCH 2017